United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7347

Docket No. 75-7347

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P/S

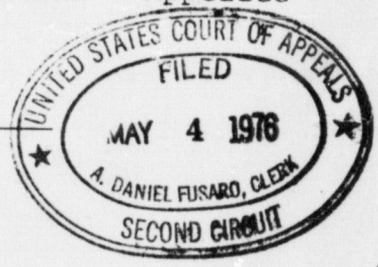
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES WYPER, JR.,
Plaintiff - Appellant

VS.

PROVIDENCE WASHINGTON INSURANCE COMPANY
Defendant - Appellee



PETITION FOR REHEARING OF PLAINTIFF-APPELLANT

PAUL W. ORTH of
Hoppin, Carey & Powell
266 Pearl Street
Hartford, Conn. 06103
May 3, 1976

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PETITION FOR REHEARING

I. Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the plaintiff-appellant respectfully submits that the Court has misapprehended or overlooked the following points of fact and law:

1. Plaintiff was permanently incapacitated following his employment termination, (a) according to trial testimony, and (b) under the Social Security Act:

(a) Contrary to the indications that Mr. Wyper's incapacity may have been temporary or that there was no evidence of permanency (2897, 2899, 2901-2) is the following summarized testimony of Mr. and Mrs. Wyper: Mr. Wyper said he was mentally disturbed after leaving defendant, and was in and out of hospitals for years -- Clark Institute, Silver Hill, Hartford Hospital, Starlight, Second Chance, Beech Hill Farms, and CHAP two months ago (before trial), and that he was an alcoholic all this time and had consequently not made his claim sooner (TR 243-245). According to Mrs. Wyper, he had little interest in anything but drinking and sleeping, he did not include in his list of institutions the Veterans Hospital where he was the previous November, or the Blue Hills Clinic; he was afflicted with alcoholism all the time until trial, he was an active alcoholic except for a few days after a detoxification and then he would go back to drinking (TR 251-53). (More detailed testimony after the event of termination would have been

time-consuming and prejudicial to defendant and we also point out that there appeared to be no issue about plaintiff's inability to resume his duties as defendant's president or any rough equivalent thereof.)

(b) On January 26, 1976, an administrative law judge found that, beginning on May 8, 1968, "the claimant was under a disability as that term is defined in the Social Security Act, as amended; and that such disability has continued up to and through the date of this decision." A full copy of that decision is attached hereto as Appendix A, and of course applies to any "substantial gainful activity". (Counsel notified such judge of the three months' severance pay Mr. Wyper received from defendant. This award represented plaintiff's first regular income in years, and the accumulated portion to the date of the award was in large part quickly used for past expenses and debts. That a person wrongly denied his private and public pension finally obtained the latter, should not affect his private contractual rights.) Clearly, in the Spring of 1968, plaintiff had an illness which kept getting worse and constituted the early stages of a permanent incapacity.

2. There may have been a misapprehension of Social Security Law (2898-9):

We quote from claimant's first two proposed conclusions of law to the administrative law judge, with which he presumably agreed:

"1. Claimant for some time has been disabled by

chronic alcoholism within the meaning of the former and/or the recently revised listing 12.04 in the Appendix to Subpart P of the Social Security Administration Regulations No. 4.

2. Claimant has been and is also disabled because he has for some time through his addiction to alcohol so far lost self-control that he is impotent to seek and use means of rehabilitation, and cannot engage in any substantial gainful activity. Baticheck v. HEW, 374 F. Supp. 940 (EDNY 1975) CCH 14,196; Evans v. Richardson, (EDC 1973), CCH 17,024, and similar recent cases, which should now be persuasive since the listing removed misunderstanding flowing from 'irreversible organ damage'."

(To point up the irony between the social security award and this Court's decision, counsel states as an officer of this Court, that a government-supplied psychiatrist from the University of Connecticut Medical School did testify that claimant was, in effect, an "involuntary" alcoholic, incapable of self-help or the help of others due to his underlying personality disorders which made alcohol cessation highly unlikely from early 1968 through 1975; and he had irreversible brain damage. Counsel reads part of this Court's opinion (2899) to be to some extent influenced by the notion that all alcoholism is "voluntary", or "curable by abstinence". If counsel is wrong in this reading, he believed in any event that defendant's correct admission that alcoholism is an illness or disease, as well

as the absence in defendant's pension plan of any exclusion for a "voluntary" incapacity, such as a broken back due to participation in the high risk sport of skiing, obviated the necessity for similar psychiatric testimony at trial. Counsel realizes that the Social Security determination is beyond the record in this case, but again points out that Mr. Wyper's post-termination chronic alcoholism and inability to resume the presidency did not fairly appear to be in issue.)

3. There is no mention of two major inferences of incapacity, either or both of which a jury could reasonably have drawn:

The circumstances surrounding plaintiff's "resignation" decision (under which the Board of Directors informed him that he was not the man for the job and that he would not be the man for the job and that he would not be elected again in May, together with indicia of heavy drinking) permit the inference that the Board had decided in early April that Mr. Wyper was unable to continue as president. Even assuming that an inference of dismissal on grounds of incompetence due to heavy drinking could also be drawn (2902), it would be appropriate, in considering a motion for a directed verdict, to take the inference a jury may have drawn which is more favorable to plaintiff.

In addition, plaintiff submits that a strong inference of inability to run a company can reasonably be drawn

from plaintiff's signing at age 50 of a release of rights to a $20,000 annual pension for only three months severance pay (or, if plaintiff didn't comprehend this scope of the release, that then advantage was taken of him). A jury should have been permitted also to accept or reject this inference; but if the inference is reasonable, it should constitute additional evidence of incapacity in passing on defendant's motion for a directed verdict.

4. Plaintiff had no real choice but to "resign":

Plaintiff so testified, and in any event resignation or no reelection in May (2894) was no real choice. Yet the Court repeatedly stresses (2894-5 , 2901) Mr. Wyper's decision or agreement to resign. Any voluntary aspect to the resignation was merely Mr. Wyper's attempt to salvage a bad situation somewhat and to preserve the hope (unrealized of course) of finding another good job. And since plaintiff has proven physical and mental disability, regardless of "more difficult standards" of court review (2902), this proof minimizes the meaningfulness of any "decision" to resign.

5. The admissions of an alcoholic and his carrying out of routine functions during the last month have been unduly emphasized (2895, 2902-3):

This point is treated mainly on page 22 of plaintiff's main brief and page 2 of the reply brief. The crucial aspect is that a jury could have determined that the "admissions" were contrary to fact and that plaintiff's coming

to work and going through meeting routines were not the crucial duties of a president. Aside from the inferences above mentioned, aside from directors' knowledge of drinking, aside from medical testimony which related back several months, and aside from Mr. Wyper's testimony, the key testimony as to job performance came from three former officers (2894, brief 8-10), and these men did not testify as to just the last month. And the directors did decide in early April that plaintiff was not the man for the job. A jury could not only have accepted this testimony of inability to perform in preference to later admissions "of a chronic alcoholic", but also it could have found that, consequently, an effective denial of the disability pension was arbitrary. Furthermore, even if plaintiff were not incapacitated from performing as president in early April, his incapacity on the date of termination in May is what is important in regard to the contract between the parties. Plaintiff did not actually resign until May 8th, and if the day before he had broken his back and become permanently paralyzed, he would have been entitled to a disability pension.

6. Defendant's pension plan does not require any request to the pension board (2901);

The pension board was dominated by directors who had already decided Mr. Wyper's fate in April. Any requests to it would have been fruitless but he did make informal inquiry of a board member (2897; brief 15). While plaintiff may have overemphasized in his brief any duty of the pension

board to take the initiative, he submits this Court has over-emphasized his duties under the circumstances to have "come forward" with a claim and evidence earlier. Indicia are that he had "given up" on his pension in 1968, and his disease was clearly a major factor then and thereafter. In effect, he is being penalized now for not having sought legal advice much earlier to protect his rights. The testimony on which he mainly relies, medical and former officers', was available in the Spring of 1968. Defendant has not been prejudiced: physical evidence of alcoholism in Spring of 1968 was incontrovertible, and performance of presidential duties could have been controverted by defendant, if at all, in 1975 in court. Who did what and when about the "claim" is essentially irrelevant under a non-specific plan which should be liberally construed in favor of the employee. Defendant's board of directors in effect denied plaintiff contractual rights; the real question now is whether a jury, taking the evidence most favorable to plaintiff, could decide this action was arbitrary or in bad faith.

7. Plaintiff's right to a jury determination has been denied even under the narrow review standard used by the Court:

The foregoing reasons (and plaintiff's briefs) indicate how the correct "most favorable light" approach to the evidence has been erroded, and how, as a result, plaintiff's right to a jury determination has been denied. Plaintiff contends that even under the employer-oriented,

"relatively narrow" review standards (2900) a jury should have been allowed to decide the complex of facts adduced by him. It is respectfully suggested that this Court rereview this matter as if plaintiff were in the Spring of 1963 a sick person, a mentally disturbed person. Then it is reasonable to state that a jury could have found that Mr. Wyper was unfairly and arbitrarily treated, or worse, and that his continuing illness excused his slow and unclear assertion of his contractual claim. This is not a plea for sympathy, but rather a plea for equal treatment of a person who had become ill with alcoholism, and who, as has been indicated, did not (and could not) recover.

3. The review standard adopted has erroded the contract and does not comport with Connecticut law:

Plaintiff submits that this Court has relied upon employer-oriented decisions and has adhered to a standard, which, unless at least carefully limited, undermines the contract of the parties and is out of harmony with Connecticut law. Counsel refers mainly to pages 2 and 4 of the reply brief (and 20 through 25 of the main brief). The narrow review standard does not square with the principle in Ellis v. Emhardt Mfg. Co., 150 Conn. 501, 504, 191 A2d 546 (1963), that one should not be a judge of his own case. Connecticut law is cited in the case on which we mainly rely because it is fairer to the employee and injects a more

objective standard of "reasonable judgment". Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 231 A2d 800, 805 (1967). There the employee's health was being damaged by continued employment, and the court said that the interest of members of the board did not encourage judicial deference, its arbitrary action was not supportable, and the contract would not be read to make the promise illusory. Had a similar approach, supported by Connecticut law, been used in this case, plaintiff's case should clearly have gone to jury.

II. Plaintiff-appellant suggests a rehearing in banc under Rule 35, primarily due to points 7 and 8 above.

Respectfully submitted,

Plaintiff-appellant,
James Wyper, Jr.

By Paul W. Orth

Paul W. Orth
Of Hoppin, Carey & Powell
266 Pearl Street
Hartford, Connecticut 06103

This is to certify that two copies of the foregoing petition have been mailed to George Muir, Esquire, Attorney for defendant-appellee.

Paul W. Orth

Paul W. Orth

APPENDIX A

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING DECISION

In the case of	Claim for
James Wyper (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)(Leave blank if same as above)	043-09-3245 (Social Security Number)

This case is before the administrative law judge upon a timely request for hearing filed by the claimant who is dissatisfied with the prior determination disallowing an application for a period of disability under section 216(i) of the Social Security Act, 42 USC 416(i), and for disability insurance benefits under section 223 of the Act, 42 USC 423.

An initial application for disability insurance benefits alleging an onset date of May 8, 1968, was filed on December 13, 1968, by Florence Wyper on behalf of the claimant. The application was denied on February 24, 1969. A second application alleging an onset date of July 15, 1969, was filed on July 24, 1970. That application was denied on September 15, 1970. The current application alleging an onset date of May 7, 1968, was filed on April 24, 1973. The claimant's request for hearing was based upon the 1973 application.

In view of the testimony adduced at the hearing and additional medical evidence offered by the claimant, it is the conclusion of the administrative law judge that good cause exists for reopening the Administration's prior determination of the claimant's 1968 and 1970 applications pursuant to Sections 404.957 and 404.958 of Social Security Administration Regulations No. 4, 20 CFR 404.957 and 404.958.

In view of the administrative law judge's conclusion, which is wholly favorable to the claimant, recitation of the evidence is unnecessary.

After careful consideration of all the evidence of record, the administrative law judge finds that the disability earnings requirements are met; and that beginning on May 8, 1968, the claimant was under a "disability" as that term is defined in the Social Security Act, as amended; and that such disability has continued up to and through the date of this decision.

It is also the finding of the administrative law judge that the claimant's work activity from March 1 through July 15, 1969, and from November 1971 through February 1972 constituted unsuccessful work attempts within a trial work period.

It is the decision of the administrative law judge that the claimant, based upon the application filed on December 13, 1968, is entitled to a period of disability commencing on May 8, 1968, and to disability insurance benefits, under sections 216(i) and 223, respectively, of the Social Security Act, as amended.

Francis J. Haynes
Administrative Law Judge
135 High Street - Room 331
Hartford, Connecticut 06101

date: JAN 26 1976